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California Employment Law: 2022 Q3/Q4 Recap and 2023 Key New Legislation

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Key Cases:

Leenay v. Superior Court
81 Cal.App.5th 553
(July 22, 2022)

Plaintiff brought an individual wage and hour lawsuit against her employer, Lowe's Home Centers, LLC ("Lowe's"), under the California Private Attorneys General Act ("PAGA"). The trial court consolidated the lawsuit with five other cases. Thereafter, Lowe's moved to stay the consolidated action while it litigated 50 other matters pending against it in arbitration at the time. Lowe's sought to stay the action pursuant to Code of Civil Procedure section 1281.4, which requires a court to stay an action pending arbitration "of a controversy which is an issue involved" in the action. Plaintiff challenged the order and the Court of Appeal reversed it. In reversing the order, the higher court explained that Section 1281.4's statutory language and legislative history precluded the stay because it requires the pending action to include "an arbitrable question and the parties in the arbitration." Further, the section's legislative history intended Section 1281.4 to remedy a party's failure to arbitrate. The court found that plaintiff was not a party to any of Lowe's arbitration proceedings and thus Section 1281.4 was inapplicable.

This case serves as a good reminder to employers that if arbitration of claims is desired, a strong and specific arbitration agreement is a prerequisite to meeting that objective.

Gallo v. Wood Ranch USA Inc.
81 Cal.App.5th 621
(July 25, 2022)

Plaintiff entered into an arbitration agreement that specified the applicability of the California Arbitration Act ("CAA") with her employer, Wood Ranch, LLC ("Wood Ranch"). She eventually filed an action against her employer, alleging discrimination and retaliation under the California Fair Employment and Housing Act. Wood Ranch moved to compel plaintiff to arbitrate her claims, which the court granted. The company, however, delayed in paying the arbitrator, leading plaintiff to file a motion to vacate the order to arbitrate. The trial court granted plaintiff's motion, finding the late payment constituted a material breach of the arbitration agreement. Wood Ranch appealed the trial court's ruling, arguing that California Code of Civil Procedure sections 1281.97 and 1281.99, which specify the enforceability of arbitration agreements and allow courts to issue sanctions for material breaches of the same, are preempted by the Federal Arbitration Act ("FAA").

The Court of Appeal disagreed with the employer. It found that the FAA does not preempt Sections 1281.97 and 1281.99 and allows arbitration-specific state law that does not frustrate the FAA's intent and objective. The court reasoned that the sections are akin to a statute of limitations, which the FAA permits. It also found that the sections facilitate arbitration by preventing parties who compelled arbitration from subsequently stalling by refusing to pay the necessary fees.

This case is significant because it clarifies preemption issues between the FAA and the CAA regarding state law arbitration procedures. It also serves as a warning to proponents of arbitration who are responsible for arbitration fees to take the timely payment of such fees seriously.

Key Cases:

Meda v. AutoZone Inc.
81 Cal.App.5th 366
(July 19, 2022)

Plaintiff sued AutoZone Inc. ("AutoZone") under PAGA, alleging AutoZone failed to provide suitable seating for employees required to work at the cashier and parts workstations within the business. AutoZone moved for summary judgment, arguing it provided suitable seating pursuant to Industrial Welfare Commission Wage Order No. 7-2001, which provides that "employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." The company argued that it complied because plaintiff knew of the existence of two available chairs accessible to her and could not be considered an aggrieved employee because the company provided her with suitable seating. Plaintiff opposed the motion, arguing that the two chairs were insufficient to satisfy the Wage Order because at least five chairs were required to accommodate all store employees. She also argued that suitable seating was not provided because the chairs were not located at her specific workstation. The trial court granted AutoZone's summary judgment motion and plaintiff appealed.

The Court of Appeal reversed the order, finding a triable issue of material fact as to whether appropriate chairs were provided to AutoZone's employees. The court observed that where an employer has not expressly advised its employees that they may use a seat while working and has not provided a designated seat for a specific workstation, whether the employer has "provided" suitable seating is questionable. Moreover, the inquiry may turn on the following factors: (1) the proximity of available chairs to the employee's workstation, (2) the employer's instruction as to the availability of chairs, (3) the employee's history and practice of using purportedly available chairs, and (4) the authority of store managers to provide additional chairs.

This case illustrates factors that may go into determining compliance with Wage Order No. 7-2001 and shows that simply assuming an employee has access to suitable seating is likely not enough to satisfy the Wage Order.

Howitson v. Evans Hotels, LLC, et al.
81 Cal.App.5th 475
(July 21, 2022)

Plaintiff worked as a room service attendant for Evans Hotels LLC and the Lodge at Torrey Pines Partnership, L.P. (collectively, "Evans Hotels"), and initially filed an individual and putative wage and hour class action against the hotel. The employer subsequently made an offer of compromise to plaintiff that included the entry of judgment in her favor as an individual. Plaintiff accepted the offer, and judgment was entered accordingly. After the court entered the judgment, plaintiff then instituted a PAGA suit against the hotel, based on facts identical to her initial lawsuit. Evans Hotels sought to dismiss the case based on its argument that plaintiff's second action was precluded based on res judicata principles. The court sided with the hotel, and plaintiff appealed.

The issue on appeal was whether plaintiff was precluded from bringing a PAGA claim given that she accepted the offer to compromise in the first lawsuit. The Court of Appeal answered the inquiry in the negative. The court explained that the harm suffered by plaintiff and the harm addressed by PAGA are different. It emphasized that the first lawsuit compensated plaintiff's individual harm, whereas the PAGA lawsuit was for state and general public violations. It also found that the parties in the two respective lawsuits differed and that no privity existed between plaintiff and the state because the state did not have an interest in the first lawsuit. Last, the court held that res judicata did not apply because no claims were actually litigated in the first lawsuit.

This case serves as a distinct reminder of the possibility that a PAGA action may lie independent of an individual's claims that may otherwise appear to have arisen from the same set of facts.

Key Cases:

Camp v. Home Depot
84 Cal.App.5th 638
(October 24, 2022)

Plaintiff, a nonexempt employee, sued Home Depot for wages that were unpaid due to Home Depot's timekeeping system. Home Depot has a timekeeping program that can capture all the time its employees work. It, however, had implemented a quarter-rounding policy that rounded time down, if the time increment was seven minutes or less, and up, if the time increment was eight minutes or more. As a result of the policy, plaintiff was shorted 7.8 hours between 2015 and 2020. The trial court found the company's rounding policy was neutral on its face and in its application and granted summary judgment to the employer accordingly. Plaintiff appealed.

The Court of Appeal reversed the trial court's order, explaining that when an employer is able to capture the exact time an employee worked, the employer must pay the employee for all the time worked. The Court based its holding on California's wage and hour laws, California's strong public policy favoring employees, and seminal cases concerning time-rounding policies.

This case is important because it demonstrates that although time-rounding policies are lawful in California under certain circumstances, if an employer has the technology to capture the exact time employees work, it must pay according to the more precise records.

New Legislation - Effective January 1, 2023

Pay Transparency Law
(California SB 1162)

SB 1162, which came into effect on January 1, 2023, imposes a number of new requirements on employers of varying sizes. Employers with 100 or more employees are required to provide pay data reports that include the median and mean hourly rates for each combination of race, ethnicity, and sex within each job category, to the California Civil Rights Department by the second Wednesday of May each year. Under prior law, such employers could satisfy less stringent pay data reporting requirements by submitting the employer's federally required Equal Employment Report. This is no longer an option.

SB 1162 also requires private employers hiring 100 or more employees through labor contractors to disclose "all necessary pay data" information if employees were hired through the employer's usual course of business. The reporting deadline will also fall on the second Wednesday of May each year.

The new law also imposes a civil penalty of up to $100 per employee for failure to file the required report. In addition, it allows an increased fine of $200 per employee for a subsequent violation.

SB 1162 also requires employers with 15 or more employees to include the pay scale for a position in any job posting. The requirement also extends to any third party engaged by the employer to announce, publish, or post the job position. Employers must also provide the pay scale information to employees upon request. Employers may incur a civil fine of between $100 and $10,000 for failing to provide the pay scale information.

Additionally, pursuant to SB 1162, failure to keep employment records for three years after an employee's departure creates a rebuttable presumption against the employer in wage discrepancy suits.

New Legislation - Effective January 1, 2023

Expansion of Designees for Family and Paid Sick Leave Laws (California AB 1041)

Effective January 1, 2023, AB 1041 expands the California Family Rights Act to include taking a protected leave to care for a "designated person." The bill defines such a person as "any individual related by blood or whose association with the employee is the equivalent of a family relationship." AB 1041 also expands Labor Code 245.5's Paid Sick Leave Law to allow employees to take paid sick leave to care for a "designated person," who it defines for this specific expansion as "a person identified by the employee at the time the employee requests paid sick days." Notably, for purposes of taking a paid leave to care for others, the bill does not require the designated person be related to or akin to a relative of the employee.

An employee seeking leave under AB 1041 can make his/her designation when the employee requests his/her protected/paid leave and need not make the designation sooner. Employers, however, can limit an employee's designation to only one individual per 12-month period.

Contraceptive Equity Act of 2022 (California SB 523)

On January 1, 2023, SB 523 revised the California Fair Employment and Housing Act regarding "reproductive health decision-making." The bill prevents employers from discriminating against employees and job applicants for such decisions and prohibits employers from requiring prospective employees to disclose any "reproductive health decision-making" as a condition for employment. ance agreement.

New Legislation - Effective January 1, 2023

FAST Recovery Act (California AB 257)

This bill is also known as the Fast Food Accountability and Standards Recovery Act or FAST Act. Among other things, it creates Labor Code section 1470, which establishes a Fast Food Council within the Department of Industrial Relations. The Council will consist of 10 appointed members, who will be responsible for "promulgat[ing] minimum fast food restaurant employment standards, including … standards on wages, working conditions, and training, as are reasonably necessary and appropriate to protect and ensure the welfare, including the physical well-being and security, of fast food restaurant workers."

Mandated Bereavement Leave (California AB 1949)

AB 1949, which took effect January 1, 2023, makes bereavement leave a protected leave under the California Government Code. The bill makes it unlawful for an employer with five or more employees to deny an eligible employee's request for up to five intermittent days off due to the loss of a qualifying family member (i.e., a spouse, child, parent, sibling, grandparent, grandchild, domestic partner, or parent-in-law). The leave must be completed within three months of the family member's death. Depending on whether an employer has an existing bereavement policy, the leave may be paid or unpaid. If the employer does not have a paid bereavement policy, the employee must be allowed to "use vacation, personal leave, accrued and available sick leave, or compensatory time off that is otherwise available to the employee."

The bill also makes it unlawful under the California Fair Employment and Housing Act to discriminate or retaliate against an employee for seeking bereavement leave.

Legislation from Midyear Newsletter That Has Since Passed

Prohibition of Off-the-Job Cannabis Use Discrimination (California AB 2188)

This bill prohibits an employer from discriminating against employees or applicants for their use of cannabis “off the job and away from the workplace.” Employees are nevertheless not allowed to be impaired by or use marijuana while at work.

AB 2188 also prohibits an employer from discriminating against an applicant or employee who fails a drug test that detects “nonpsychoactive cannabis metabolites in their urine, hair, or bodily fluids.” However, it would not prevent an employer from conducting pre-employment drug testing through methods that do not screen for nonpsychoactive cannabis metabolites.

The law applies to the building and construction industries, federal contractors, federal funding recipients, or federal licensees required to maintain drug-free workplaces. It does not apply to occupations that are required by federal or state laws to be tested for controlled substances.

Since our midyear report, this bill passed and came into effect on January 1, 2023.

Prohibition of Employer Retaliation During Emergency Condition (California SB 1044)

This bill prohibits an employer, in the event of a state of emergency or an emergency condition, from taking or threatening disciplinary action against an employee who refuses to attend work or who leaves work because the employee feels unsafe. “State of emergency” includes a government-declared disaster or alert of natural disaster or emergency that poses an imminent and ongoing risk of harm to the workplace, the employee, or the employee’s home. “Emergency condition” means “conditions of disaster or extreme peril” caused by natural forces or a criminal act, or an order to evacuate a workplace, a worker’s home, or the school of a worker’s child due to natural disaster or a criminal act. “State of emergency” and “emergency condition” do not include a health pandemic.

The bill also prohibits an employer from preventing employees from accessing their mobile device or other communications device to seek emergency assistance, assess the safety of the situation, or communicate with a person to confirm their safety. It requires an employee to notify the employer of the state of emergency or emergency condition that requires the employee to leave or refuse to report to the workplace.

This bill also passed since our midyear update and came into effect on January 1, 2023.

COVID-19

Notification Requirement Related to COVID-19 (California AB 2693)

AB 2693 extends employers' compliance requirements to notify employees regarding COVID-19. Employers must display a notice with (1) the dates on which an employee with a confirmed case of COVID-19 was on the worksite premises, (2) the location or area in which the employee potentially exposed others, (3) contact information for cleaning and disinfecting the worksite or area, and (4) contact information for employees about COVID-19-related benefits under federal, state, and local laws.

AB 2693 extends the notification requirement to January 1, 2024.

Workers' Compensation Presumption Extends (California AB 1751)

AB 1751 extends workers' compensation presumption for COVID-19 essential workers to January 1, 2025.

Specifically, AB 1751 extends the presumption that an employee contracted COVID-19 at the workplace unless the employer proves otherwise.

Notable Verdict

Michael Ross v. Bassett Unified School District
Los Angeles Superior Court

Last July, a Los Angeles jury found a school district liable for failing to prevent retaliation and for retaliating against a former school teacher for bringing a prior discrimination suit and for speaking out about sexual misconduct by one of the district's janitors. The district maintained that it terminated plaintiff for legitimate reasons.

In 2016, the plaintiff, who began working for the district in 1994, brought a discrimination and harassment suit against the district. Among other things, he claimed the district failed to discipline students who called him the "N-word." The case resolved. Plaintiff, however, alleged that after the settlement, his employer continued to mistreat him and put him on an extended administrative leave for reporting a student's complaint about a school janitor's sexual misconduct.

Ultimately, the jury awarded $24.8M to the teacher and allocated $22M of that amount for the teacher's emotional distress.

About Walsworth:

Walsworth's employment lawyers provide a broad spectrum of employment litigation, as well as advice and counsel services. We represent a wide variety of large and small businesses, public entities, and nonprofit corporations. We also act as coordinating and local counsel by assisting our clients and their national counsel in managing all aspects of discovery, trial preparation, and trial in large-scale litigation.

We have successfully defended single, multi-plaintiff, and class action claims in state and federal courts, and in private, binding arbitration and mediation. These cases involved allegations of wrongful termination, harassment, discrimination, whistleblowing, wage and hour violations, breach of contract, failure to accommodate, failure to engage in the interactive process, failure to prevent discrimination and harassment, violations of the Family and Medical Leave Act ("FMLA") and the California Family Rights Act ("CFRA"), misappropriation of trade secrets, and unfair competition. We have also successfully represented employers at administrative hearings before the Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, the California Division of Labor Standards Enforcement, the Employment Development Department, and the Workers' Compensation Appeals Board in connection with Labor Code section 132a discrimination/retaliation and serious and willful claims. Our team has also represented public entities in arbitrations, Skelly (disciplinary) hearings, and Pitchess motions.

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Our Work:

We litigate and provide advice and counsel for a full scope of labor and employment matters, including but not limited to:

- Disability Access and Accommodation
- Employee Handbooks
- Executive Compensation
- FMLA/CFRA Leave Management
- Independent Contractor Agreements
- Policy Memoranda (including anti-harassment policies and investigation guidelines)
- Severance Policies and Separation Agreements
- Sexual Harassment Policies and Prevention Training
- Terminations
- Whistleblower Claims
- Workplace Investigations and Audits

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